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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 506 .

ACCINANTO LTD., *et al.*,

Petitioners,

—against—

A/S J. LUDWIG MOWINCKELS REDERI and COSMOPOLITAN SHIPPING CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

HENRY N. LONGLEY,
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Attorneys for Petitioners.

INDEX.

PAGE

Opinions Below 3

Jurisdiction 4

Statement 4

The Questions Presented 7

I. When cargo of a type which inherently presents a known danger of terrible disaster is accepted by an ocean carrier for transportation, is not that carrier obligated to exercise care commensurate with the known danger? Is not "the actual fault or privity of the carrier" within the meaning of the Carriage of Goods by Sea Act, to be measured by the rule which governs negligence in other cases?.... 7

II. Does the fire exception of the Carriage of Goods by Sea Act provide a carrier with an exemption from liability for damage to cargo discharged on shore after an unjustifiable deviation? 20

Additional Questions to Be Urged If the Petition Is Granted 23

III. Is not an ocean carrier's liability for fire damage on shore to be measured by a different rule from that applicable to fire damage on shipboard? 23

IV. Is not an agent of an ocean carrier liable for damage resulting from the negligence of its sub-agents and servants? 24

Reasons for Allowance of the Writ 27

Conclusion 28

TABLE OF CASES CITED:

PAGE

Anderson v. *Lorentzen*, 160 F. (2d) 173 (C. A. 2) 16

Balto, The, 282 Fed. 235 (C. A. 2) 23

Chiarello Bros. Co. v. *Pederson*, 242 Fed. 482 (C. A. 2) 27
Cobb v. *Knapp*, 71 N. Y. 348 25
Consolidated Gas Co. v. *Connor*, 114 Md. 140, 78 A. 725 27
Consumers Co. v. *K. K. K.* (*The Venice Maru*), 320 U. S. 249 .....13, 14, 19

Dalchite et al. v. *U. S.*, Docket #308 5
Dupont v. *Vance*, 19 Howard 162 25

E. H. Emery & Co. v. *American Refrigerator Transit Co.*, 193 Iowa 93, 184 N. W. 750 27
Employers Fire Ins. Co. v. *United Parcel Service of Cincinnati, Inc.*, 99 N. E. (2d) 794 (Ct. of App. of Ohio) 27

Fox West Coast Agency Corp. v. *Forsythe*, 131 F. (2d) 629 (C. A. 9) 27

Gazelle and Cargo, The, 128 U. S. 474 25
Great Atlantic & Pacific Tea Co. v. *Lloyd Brasileiro* (*The Pocone*), 159 F. (2d) 661 .....16, 17

Jungshoved, The, 272 Fed. 122 (S. D. N. Y.) 25

Landreth v. *Phillips Petroleum Co.*, 74 F. Supp. 801 (W. D. Mo.) 27

Margulies v. *Denner*, 185 N. Y. Misc. 139, 56 N. Y. S. (2d) 856, aff'd 297 N. Y. 562 27
Melnick Bldg. & Loan Assn. v. *Melnick*, 64 A. (2d) 773, 361 Pa. 328 25
Mollino v. *Ogden & Clarkson Corp.*, 243 N. Y. 450 27

O'Connor, Harrison & Co. v. *Klingel*, 16 F. (2d) 460 (C. A. 9) 25
Ore S. S. Corp. v. *Hassel*, 137 F. (2d) 326 (C. A. 2).. 25

PAGE

Pacific Coast Co. v. *Yukon Independent Tr. Co.*, 155 Fed. 29 (C. A. 9) 23
Pelotas, The, 66 F. (2d) 75 (C. A. 5) 20, 22
Perth Amboy No. 1 and 18 Barges, 1934 A. M. C. 152 (S. D. N. Y.) 25

Quinn v. *Southgate Nelson Corp.*, 121 F. (2d) 190 (C. A. 2) 27

Richelieu, The, 48 F. (2d) 497.....17, 18

St. Johns N. F. Shipping Corp., The v. *Companhia Geral, etc.*, 263 U. S. 119 .....20, 23
Sarnia, The, 278 Fed. 459 (C. A. 2) 20, 23
Smith, Kirkpatrick & Co. v. *Colombian S. S. Co., Inc.*, 88 F. (2d) 392 (C. A. 5) 25

Texas City Disaster Litigation, In re, Findings of D. C., unreported; Court of Appeals, 197 F. (2d) 771 8
Thomas P. Beal, The, 11 F. (2d) 49 (C. A. 3) 16

Western Lumber Mfg. Co. v. *U. S.* (*The Brush*), 9 F. (2d) 1004 (N. D. of Calif.) 22
Willdomino, The, 272 U. S. 718 .....20, 22
Willfaro, The, The Willsolo, 9 F. (2d) 940 (N. D. of Calif.), affirmed 9 F. (2) 622 (C. A. 9) 16

OTHER AUTHORITIES CITED:

Carriage of Goods by Sea Act, 1936 (46 U. S. C. 1300-1315) 6, 7, 11, 18, 19, 20, 22, 23, 24, 28
Section 1301 (e) 6, 6n
Section 1304 (2) (b) 6, 6n

Fire Statute (46 U. S. C. 182) 17, 19, 21

Harter Act (46 U. S. C. 190-195), Section 192 22

Limitation of Liability Act (46 U. S. C. 183-189), Section 183 22

28 U. S. C. 1254 (1) 4

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ACCINANTO LTD., *et al.*,

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A/S J. LUDWIG MOWINCKELS REDERI and COSMOPOLITAN SHIPPING CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners:

Accinanto Ltd.; New Hampshire Fire Insurance Company; Chisholm-Rider Co., Inc.; Arthur Pollak; Intermares Corp.; Samuel Dreisin and Eugene Dreisin, co-partners d/b/a S. Dreisin & Son; Leopold Berael; Fire Association of Philadelphia; Societe Roblou, S. A. R. L.; S. A. R. L. Chrislie; Soc. Anon. A. C. B. I.; N. V. Aan-En Verkoopvennootschap Van Den Belgischen Borenbond; S. A. Jean Delvaux; Vve C. Schoolmeesters; Providence Washington Insurance Co.; Tip-Top Garage, A.-G.; Royal Insurance Company, Ltd.; Goodyear International Rubber Ex-

port Co., Inc.; Isbecque-Todd, S. A.; St. Paul Fire and Marine Insurance Co.; Nash-Kelvinator Corp.; Lou Bunin Productions, Inc.; Chemo-Puro Manufacturing Corp.; Edelco International Corp.; Rudolf Kellerman, Inc.; Stenson Export Trading Co.; Gold Leaf & Metallic Powders, Inc.; Inter Allied Industrial Corp.; International Harvester Export Co.; Alexander Saccerd; General Motors Corporation; Joseph Rappaport, Arthur Rappaport, David Bly and Herman Wachs, co-partners d/b/a Jardox Fur Co.; The Bastian-Blessing Company; The Automobile Insurance Company of Hartford, Connecticut; Atlantic Mutual Insurance Company; International Harvester Export Company; E. I. Dupont de Nemours & Company; International Selling Corporation; Adolph Bass; Glens Falls Insurance Company; Orient Insurance Company; Ottis Lucas; Commercial Solvents Corporation; Gregory Salomon & Sons, Inc.; Sinason-Zeitlin, Inc.; Ford S. A. F. Poissy; S. A. Cima-Wallut; Michael A. Embiricos; Socabex S. A.; Pierre Welter; Le Doux & Mortelmans, S. P. R. L.; Merchants' Forwarders, Inc.; D. C. Andrews & Co., Inc.; Markt & Hammacher Company; National Cash Register Company; Norwich Union Fire Insurance Society, Ltd.; Commerce Insurance Company, S. A.; Loiret y Haentjens; General Motors Continental, S. A.; Interhand, Mercury Technical Cloth & Felt Corporation; Rohner, Gehrig & Company, Inc.; Groupement d'Importation des Cuirs et Peaux Bruts; Penwick, S. A. Cooperation Pharmaceutique Francaise; Groupement d'Achat des Carburants; Max David; S. A. R. L.; United Nations Educational, Scientific and Cultural

Organization; Ste. Commerciale Lambert-Riviere; Ste. d'Etudes et de Coordination d'Enterprises de Caoutchoug et de Matieres Plastiques, S. A.; Boston Insurance Company; Eugene, Ltd.; C. L. Hauthaway & Sons, Inc.; Manufacture d'Encres Hayon, S. C.; Manufacture Belge de Rubans & Carbones S. A.; Aetna Insurance Company; A. W. Fenton and C. J. McFarland, co-partners, d/b/a The A. W. Fenton Company; Fabrik fur Firestone Produete, A. G.; Switzerland General Insurance Co., Ltd.; D. C. Andrews & Co., Inc.; La Prevoyance Compagnie d'Assurances et de Reassurances des Risques de Toute Nature, S. A.; La Concorde Compagnie d'Assurances Contre les Risques de Toute Nature, S. A.; S. A. d'Assurances Contre les Accidents de Toute Nature l'Urbaine et la Seine;

pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Opinions Below.

The opinion of the District Court for the District of Maryland, reported at 99 F. Supp. 261, appears in "Ship Appendix" (at pp. 46-63).* There was a supplemental memorandum (Ship App. 68) and the Court filed detailed findings of fact and conclusions of law (Ship App. 28-46). The opinions of the Court of Appeals for the Fourth Circuit are reported at 199 F. (2d) 134. They appear in Cross-Appellees' Appendix (at pp. 18-45).

* The record in the Court of Appeals was in appendices to the briefs of the respective parties. Those appendices, filed in this Court, are designated respectively "Ship Appendix," "Cargo Appendix," and "Appendix for Cosmopolitan Shipping Co. Inc. and A/S J. Ludwig Mowinckels Rederi, Cross-Appellees."

Jurisdiction.

The judgment of the Court of Appeals for the Fourth Circuit was filed on September 22, 1952. A motion for reargument was denied and order entered directing the issuance of mandate on October 31, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Statement.

Your petitioners were the owners or subrogated underwriters of general cargo laden on the Norwegian S. S. "Ocean Liberty" at New York for carriage to Antwerp and Havre. The vessel was under charter to respondent, A/S. J. Ludwig Mowinckels Rederi (hereinafter described as Mowinckels), who put her on berth as a common carrier. Respondent, Cosmopolitan Shipping Co., Inc. (hereinafter described as Cosmopolitan) was Mowinckels' U. S. general agent. Bills of lading were issued at New York on behalf of Mowinckels by Cosmopolitan covering all of the cargo which this litigation concerns.

At Baltimore, a prior port of loading, the #3 hold of the "Ocean Liberty" had been filled with 30,480 paper bags of fertilizer grade ammonium nitrate (throughout this litigation and hereinafter described as Fgan) weighing 1389 long tons. This commodity, when stowed in a smaller mass in a hold of the French S. S. "Grand Camp" at Texas City, Texas, some two months before, had ignited spontaneously and thereafter exploded, completely obliterating the vessel, destroying piers, many large industrial establishments and houses in that city, and

killing some 600 persons. This disaster immediately received great publicity both in this country and abroad. Litigation involving the liability of the United States as manufacturer of this dangerous commodity is now awaiting argument before this Court, a petition for certiorari having been granted on November 10, 1952, in *Dalehite et al.* v. *U. S.*, Docket #308.

The "Ocean Liberty" sailed from New York for Antwerp on July 11, 1947, but on Mowinckels' order she put in at Brest, France, on July 23rd, where she commenced discharging her cargo. Five days later, on July 28th, a spontaneous fire broke out in the Fgan filling the vessel's #3 hold. The fire developed very rapidly and was communicated to the shed of the pier where the vessel was tied up. Much of the cargo which had been discharged from the vessel to the pier was destroyed or damaged by the fire on shore. Later, the burning vessel was towed as far out in the harbor as the depth of water permitted, where a terrific explosion destroyed her, all of the cargo remaining on board, and certain shore structures; and killed a number of persons on shore.

The District Court found that the spontaneous ignition of the Fgan stowed in the #3 hold of the "Ocean Liberty" resulted from its negligent stowage; and that Mowinckels, as contracting carrier, was liable for all the losses suffered by your petitioners because the fire was caused by Mowinckels' "actual fault or privity" (Finding 26, Ship App. 41-2; Finding 28, Ship App. 43-4; Opinion of D. C., Ship App. 49-53) within the meaning of the fire exception of the

Carriage of Goods by Sea Act (U. S. C. Title 46, sec. 1304 (2) (b)).*

It held that Cosmopolitan was not a contracting carrier and that it was not liable as a tort feasor as its negligence was by reason of non-feasance; and that, moreover, the pleadings did not set out a claim against Cosmopolitan based on tort.

The Court of Appeals for the Fourth Circuit accepted all the findings of fact of the District Court. Although affirming the finding that the disaster resulted from spontaneous ignition of the Fgan stowed in the vessel's #3 hold and that the ignition was caused by the manner of its stowage, two of the judges concluded that the stowage was not negligent or, in any event, that Mowinckels' "actual fault or privity" under the Carriage of Goods by Sea Act had not been established. The dissenting judge held with the District Judge that application of the usually accepted measure of negligence established Mowinckels' liability under the Act.

While the Carriage of Goods by Sea Act by its own terms (Sec. 1301 (e))** governs rights between

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* U. S. C. Title 46, sec. 1304:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * * *

"(b) Fire, unless caused by the actual fault or privity of the carrier; * * *."

** U. S. C. Title 46:

"Section 1301. When used in this Act—

* * * *

(e) The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship."

cargo owner and carrier only while cargo is waterborne, the Court of Appeals made no distinction between Mowinckels' liability for damage to the cargo on the vessel and to the cargo on shore.

The Court of Appeals did not pass upon the question of Cosmopolitan's liability as a tort feasor.

THE QUESTIONS PRESENTED.

I. When cargo of a type which inherently presents a known danger of terrible disaster is accepted by an ocean carrier for transportation, is not that carrier obligated to exercise care commensurate with the known danger? Is not "the actual fault or privity of the carrier" within the meaning of the Carriage of Goods by Sea Act, to be measured by the rule which governs negligence in other cases?

The Texas City disaster which horrified the world established in the most ghastly way that there was great danger of terrible disaster if Fgan ignited. When Fgan was offered to Cosmopolitan for carriage on the "Ocean Liberty", about two months after the Texas City disaster, it cabled Mowinckels asking instructions as to whether or not this cargo should be carried (Finding 25, Ship App. 40). Upon Mowinckels cabling approval of its carriage, Cosmopolitan's only remaining interest was to ascertain if the Texas City disaster had led to any governmental prohibition of the carriage of Fgan (Finding 26, Ship App. 42) or if it had led to any requirement which would cause extra expense in handling it. That was the testimony of Cosmopolitan's Operations Manager (Cargo App. 84). Having satisfied himself

on these two points, he ordered the stowage of Fgan on the "Ocean Liberty".

Long before stowage of the Fgan on the "Ocean Liberty", there was extant a mass of recognized authorities warning of the danger of spontaneous ignition of ammonium nitrate when in contact with carbonaceous matter and stowed in a large mass (Finding 20, Ship App. 34-6; Finding 23, Ship App. 28-9; Finding 26, Ship App. 41-2). Fgan is ammonium nitrate the particles of which have been covered with carbonaceous matter (Finding 19, Ship App. 34); and, of course, the paper bags in which it is packed are carbonaceous.

It is inevitable that paper bags will become torn during stowage and during a voyage (Ship App. 261); and thus frayed pieces of paper are bound to become impregnated with Fgan. The wax coating of the particles of Fgan and contact of the particles with any other carbonaceous material such as torn paper, dirt of the hold, etc. increases the danger of spontaneous ignition and explosion.

The fire in Fgan on the "Grand Camp" at Texas City was spontaneous. That was the conclusion of a qualified chemist who made an immediate investigation of that disaster (Cross-Appellees' App. 43); and that was later judicially determined to have been the cause (*In re Texas City Disaster Litigation,* Findings of D. C., unreported; Court of Appeals, 197 F. (2d) 771 at 781; reference to that case in present case, Ship App. 51).

The National Board of Fire Underwriters made an immediate investigation of the Texas City disaster

and it issued its report which was widely circulated, well before the stowage of the Fgan on the "Ocean Liberty". The report commented on the necessity of stowage of Fgan on land in small blocks and for stowage on ships "to allow for circulating of air" (Finding 23, Ship App. 38). Cosmopolitan did not obtain a copy of this report (Finding 24, Ship App. 39).

Although fully informed that the Texas City disaster had resulted from ignition of Fgan stowed on the S. S. "Grand Camp", no representative of Cosmopolitan consulted with any qualified person concerning the dangers inherent in the carriage of Fgan (Finding 26, Ship App. 41-2); and none knew that it might ignite spontaneously if stowed in a large mass with limited ventilation. Cosmopolitan merely instructed Terminal Shipping Co., a Baltimore stevedore who also acted as its agent, to stow Fgan on the "Ocean Liberty"—particularly directing stowage in #3 hold—under the supervision of the Baltimore Coast Guard representative, the Baltimore Fire Department, and the local surveyor of the Board of Underwriters of New York.

No one having anything to do with the stowage of the Fgan on the "Ocean Liberty" or its supervision had any chemical experience and none knew that this commodity presented the danger of spontaneous ignition (Finding 26, Ship App. 40-1).

The #3 hold of the "Ocean Liberty" was the hottest hold of the vessel. The 30,480 paper bags of Fgan stowed in that hold were packed together as tightly as it was possible to get them (Ship App. 144, 188), without any break in the stow; and the solid block of

bags some 54′ by 47′ by 23′ was completely encased in heavy paper (Finding 26, Ship App. 40-41; Finding 27, Ship App. 42-43).

As stowed, not only was ventilation of the interior of the mass of Fgan inhibited but there was no ventilation even of the exterior (Opinion of Ct. of App., Cross-Appellees' App. 20-21).

At New York, where your petitioners' cargo was stowed on the vessel, Cosmopolitan's own officers became familiar with how the Fgan had been stowed at Baltimore (Stowage plan, Ship App. 719; Cargo App. 91-93, 107, 114-116, 129). Because of their ignorance of the danger of spontaneous ignition, they increased the danger of disaster: while, after stowage of the Fgan at Baltimore had been concluded, ventilation could at least reach the #3 hold from the weather-deck hatch through the tween deck, at New York tarpaulins were placed over the hatchboards of the hatch serving the #3 hold; the #3 tween deck was filled with cargo; the weather-deck hatch was tightly battened down and covered with deck cargo (Cargo App. 95, 115-117).

With potential disaster below decks, the "Ocean Liberty" was ordered by Cosmopolitan to sail on a Trans-Atlantic voyage with no warning to the master that any danger was presented by the cargo below decks, and with no possibility of examining the Fgan in the #3 hold to ascertain if it was heating.

In the prevailing opinion of the Court of Appeals the following is set out as the controlling doctrine (Cross-Appellees' App. 35):

> "When the shipment of Fgan was offered to Cosmopolitan, it employed Terminal to do the

> loading and directed it to follow the instructions of the Coast Guard, the Fire Department and the Board of Underwriters. In so doing, Cosmopolitan exercised all the care that could be required of a reasonably prudent man in the premises; and, if there was negligence in the stowage, it was the fault of Terminal, whose negligence would not constitute actual fault or privity on the part of the carrier."

Thus, it is the doctrine of the majority opinion of the Court of Appeals in the present case that an ocean carrier is without "actual fault or privity" within the meaning of the Carriage of Goods by Sea Act, although the following facts are established: knowing that cargo presents danger of terrible disaster if it ignites, the carrier's managing representatives make no inquiry into the ventilation which its characteristics require and they remain ignorant of the danger of spontaneous ignition if ample ventilation is not afforded it—a danger known to those familiar with its characteristics and publicized in literature of the day; they direct that the hottest hold of a vessel be stowed with this dangerous cargo under the supervision of men who are ignorant of the necessity for the amplest ventilation; the vessel is so stowed as to inhibit any ventilation of the dangerous cargo; and the ship and all her cargo are destroyed because insufficient ventilation causes this dangerous cargo to ignite spontaneously and explode.

We find this doctrine shocking. It is in conflict with the basic principles which courts have heretofore applied in measuring negligence; and it provides an ocean carrier with an easy avenue of escape from liability for negligence: the ruling is that in a fire case

an ocean carrier is not liable if it keeps itself ignorant of what is required to obviate a danger, whatever disaster may result from that ignorance.

Surely the proper principle is that set out in the dissenting opinion of the Court of Appeals in the present case (Cross-Appellees' App. 39):

> "Obviously the duty to use due care to inquire into the nature and qualities of Fgan rested heavily upon the owners and agents of the ship who undertook to stow the dangerous material on board while the memory of the Texas calamity was still fresh in the national consciousness. Even under ordinary circumstances, as we have held, a shipowner must use due care to ascertain the characteristics of goods offered for shipment. See *Bank Line* v. *Porter,* 4 Cir., 25 F. 2d 843, 845; *The Nichiyo Maru,* D. C. Md., 14 F. Supp. 727, affirmed 4 Cir., 89 F. 2d 539, 543; *The Richelieu,* 4 Cir., 89 F. 2d 497; *The Ferncliff,* D. C. Md., 22 F. Supp. 728, affirmed 105 F. 2d 1021. But in the present instance, due care rose to the highest degree of diligence to be sure that every reasonable precaution be taken so as to avoid the loss of human life and property, for it had been tragically demonstrated that great danger lurked in the carriage of the substance and that ordinary methods of stowage were not enough. Nothing else would satisfy."

That also was the conclusion of the District Judge (Ship App. 50-51):

> "Due diligence is not an absolute but a relative term to be determined under all the facts and circumstances of the particular case. One very

important circumstance is the knowledge of the very dangerous character of ammonium nitrate in transportation brought so vividly home to the shipping industry by the Texas City disaster."

* * * *

"As the carrier must have known that it was an extremely dangerous commodity to transport, due diligence under the circumstances imposed the duty of making more than ordinary routine or customary general inquiries which might be reasonably sufficient to show due diligence with respect to commodities generally. In view of the very hazardous nature of the Fgan something more was required of the carrier in this case than to rely upon merely general knowledge. It was not due diligence with respect to the safety of the general cargo for the carrier to accept this dangerous commodity without much more particular inquiry than it made in this case. Apparently too great reliance was placed upon the only general supervision of the loading by the local Fire Department, the Coast Guard and the representatives of the New York Board of Underwriters. These representatives were apparently not themselves aware of the danger of spontaneous combustion in the masses of Fgan stored in the lower holds, but the carrier cannot shift its responsibility by reliance upon the ignorance of others not charged with a particular duty."

It is apparent that the majority of the Court of Appeals relied in large part on the decision of this Court in *Consumers Co.* v. *K. K. K.* (*The Venice Maru*), 320 U. S. 249, in support of their conclusion that Mowinckels was without "actual fault or priv-

ity". In that case this Court held that the Fire Statute protects a vessel when sued *in rem* as well as the vessel owner. There, the carrier's general manager, knowing that fish meal was susceptible to spontaneous ignition, engaged a qualified independent surveyor, who also knew of the danger of spontaneous ignition, to arrange the stowage to obviate that danger. During the subsequent voyage the fish meal ignited spontaneously because, due to the negligence of this surveyor, the fish meal was stowed so solidly that insufficient ventilation was afforded it. The carrier's general manager was ignorant of how the vessel was stowed. This Court said (at p. 250):

> "The cause of the fire is found to be negligent stowage of the fish meal, which made the vessel unseaworthy. The negligence was that of a person employed to supervise loading to whom responsibility was properly delegated and who was qualified by experience to perform the work."

Although cargo owners have no representatives on shipboard when fires break out, the established law casts upon them, if they would recover from an ocean carrier for their fire losses, the onerous burden of proving the cause of a fire and that the negligence of a managing representative of the carrier is related to the fire. The decisions in *The Venice Maru* and in other cases establish the doctrine that, contrary to the legal principles applicable in most cases, an ocean carrier may, under the statutory fire exemptions, escape liability for the negligence of a qualified agent it engages to stow or supervise the stowage of cargo, *so long as the negligence of the carrier's managing officers is not involved.*

In the present case Cosmopolitan as Mowinckels' *alter ego,* failed to satisfy the carrier's primary obli-

gation of ascertaining the inherent characteristics of cargo which it knew to be terribly dangerous. The District Court held (Ship App. 49):

> "The actual fault of the carrier in this case was in authorizing the carriage of the ammonium nitrate fertilizer in large quantities in the lower holds of the ship without adequate provision for ventilation, the necessity for which could and should have been learned by the carrier if proper inquiry had been made before accepting the Fgan for carriage. The great importance of such inquiry should have been apparent to the carrier in view of the terrible disaster which had occurred about two months earlier at Texas City, Texas, where a ship then being loaded with Fgan caught fire and exploded with great loss of life and damage to property. This event was a great disaster of nearly world wide importance and especially noteworthy to the shipping industry."

(Ship App. 50):

> "* * * a carrier is charged with the responsibility of making proper inquiry as to the characteristics of the cargo that it accepts. If proper inquiry had been made by the carrier it should have been learned by it not only that very great care and caution should be taken in transporting Fgan, but also that it was under certain conditions susceptible to spontaneous combustion especially if stowed in large masses for a considerable period of time in the hold of a ship without unusually good ventilation."
>
> * * * *
>
> "* * * the acceptance of the large quantity of ammonium nitrate with knowledge of its very

> dangerous character in transportation without the proper inquiry as to the possibility of spontaneous combustion, constituted in my opinion an actual fault of the carrier."

Cosmopolitan directed that the hottest hold of the "Ocean Liberty" be filled with this dangerous cargo. It knew that Terminal Shipping Co., the Baltimore stevedore which it directed to stow the dangerous cargo at Baltimore, had never before handled Fgan (Ship App. 444, 515); nevertheless, Cosmopolitan gave no directions to Terminal to consult with a chemist and ascertain what dangers should be guarded against. Both Cosmopolitan and Terminal remained ignorant of the necessity for ample ventilation of the Fgan to guard against its inherent danger of spontaneous ignition because neither looked into the matter.

As the dissenting judge pointed out, prior to the present case the Court of Appeals for the Fourth Circuit had held in a number of cases which he cited (*supra* at p. 12), that an ocean carrier is obligated to use due care to ascertain the characteristics of cargo offered for shipment. That is still the rule in other circuits.

> *Anderson* v. *Lorentzen,* 160 F. (2d) 173 at p. 175 (C. A. 2);
> *The Willfaro, The Willsolo,* 9 F. (2d) 940 at p. 942 (N. D. of Calif.), affirmed 9 F. (2d) 622 (C. A. 9);
> *The Thomas P. Beal,* 11 F. (2d) 49 at p. 51 (C. A. 3).

In *Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro* (*The Pocone*), 159 F. (2d) 661, the Court of Appeals for the Second Circuit considered a vessel

owner's liability for fire damage to cargo under the Fire Statute which exempts an owner unless his personal "design or neglect" is involved. The Court said (at p. 664):

> "As in all such cases, the measure of the duty imposed depends upon the cost or difficulty of the precaution, compared with the hazard and the interest at stake."

(at p. 665):

> "The measure in such cases is not what the owner knows, but what he is charged with finding out. He may, if he will, put his ship at hazard and answer as he can to his underwriters, but to the cargo he must not be indifferent; he is relieved of his absolute liability at common-law only upon condition that he exercises care measured by the occasion."

That Court said that a finding of negligence (p. 665):

> "sets a standard of conduct, which while it is applicable only to the concrete situation, involves a choice between, and an appraisal of, two contrasted values—the needed precaution and the possible damage."
>
> * * * *
>
> "Even so, after the damage has been discounted by the risk, the decision involves a comparison of the contrasted values: the necessary precautions and the stake; and that in turn demands the setting of a standard, a norm, an imperative, * * *."

In *The Richelieu,* 48 F. (2d) 497, the Court of Appeals for the Fourth Circuit, in dealing with a rail

carrier's liability for damage resulting from an explosion of pitch dust held (at p. 501):

> "* * * the contention that the explosibility of pitch dust was not known prior to the explosion on the Richelieu cannot be sustained. Not only was there information available as to explosions which had occurred, with opinions by experts and officials of government departments that pitch dust was explosive, but it also seems to us that, in the absence of such information, the railroad company, with its vast experience as a carrier of commodities, should have known that this cloud of carbonaceous dust was explosive, and that it was dangerous to bring a source of ignition in contact with it. The man on the street may not know the dangerous character of carbonaceous dust, but this carrier knew, or should have known it; * * *."
>
> * * * *
>
> "With the general and common knowledge existent as to the explosive character of carbonaceous dusts in general, and with the information which the railroad might have obtained, and which it should have obtained when it held itself out as qualified to handle pitch, as to the explosibility of pitch dust in particular, there can be no question that it was guilty of negligence * * *."

Information was readily available to anyone interested that Fgan inherently presented the danger of spontaneous ignition. As Cosmopolitan did not satisfy its primary obligation, we submit that delegation of the duty of stowing the vessel to a stevedore, equally ignorant of the danger of spontaneous ignition, does not exempt Mowinckels from liability under the fire exception of the Carriage of Goods by Sea Act.

In *The Venice Maru* this Court said, in relation to the Fire Statute (320 U. S. at 255):

> "It enabled the Carrier to compete by offering a carriage rate that paid for carriage only, without loading it for fire liability. The shipper was free to carry his own fire risk, but if he did not care to do so it was well known that those who made a business of risk-taking would issue him a separate contract of fire insurance. Congress had simply severed the insurance features from the carriage features of sea transport and left the shipper to buy each separately."

This language taken alone would suggest that it is the view of this Court that the Fire Statute provides a vessel owner with an absolute exemption from liability for fire. The prior discussion, however, makes it clear that the Court was referring to fire losses which do not involve the negligence of a vessel owner's own managing representatives. Nevertheless, since the decision in *The Venice Maru,* lower courts have been prone to assume that when cargo is lost as the proximate result of fire, the carrier is not liable.

Fire is the greatest single cause of loss of cargo at sea. While neither the Fire Statute nor the fire exemption of the Carriage of Goods by Sea Act should be applied with a niggardly hand, nevertheless, the conclusion on the established facts of the present case that the carrier was without "actual fault or privity" is in effect a notice to ocean carriers that if they wish to carry dangerous cargo which may ignite, their best policy is to remain ignorant of what may cause ignition, for otherwise they may be obliged to incur additional expense if they would escape liability for subsequent fire losses.

II. Does the fire exception of the Carriage of Goods by Sea Act provide a carrier with an exemption from liability for damage to cargo discharged on shore after an unjustifiable deviation?

The cargo discharged from the "Ocean Liberty" to the pier at Brest, was still in the carrier's custody (Cargo App. 2-3). Much of it was destroyed or damaged while on the pier as the result of the fire spreading from the vessel to the pier before the vessel could be towed away.

Certain cargo which had been carried on the deck of the "Ocean Liberty" in breach of the contracts of carriage providing for under-deck stowage, was thus damaged. While this loss was not causally related to the prior carriage of the cargo on the vessel's deck, we submit that this is irrrelevant to the question of the carrier's liability. Such a breach of contract renders the carrier liable for a deviation.

> *The St. Johns N. F. Shipping Corp.* v. *Companhia Geral, etc.,* 263 U. S. 119 at p. 124.

This Court and other courts have held that after an unjustifiable deviation the carrier is liable as an insurer and that it is irrelevant that there is no causal relationship between the deviation and subsequent loss.

> *The Willdomino,* 272 U. S. 718 at p. 727;
> *The Pelotas,* 66 F. (2d) 75 at p. 77 (C. A. 5);
> *The Sarnia,* 278 Fed. 459 at pp. 463-4 (C. A. 2).

The parties had chosen a case as representative of the shipments where this issue is presented (Ship

App. 596-7). We argued and briefed in the District Court that, without relation to the cause of the fire on the "Ocean Liberty", the carrier cannot escape liability for damage to the cargo carried on deck in breach of the carrier's contracts. The District Court did not feel called upon to discuss this issue as it found that all of your petitioners were entitled to recover because it held that the fire resulted from the carrier's "actual fault or privity".

Erroneously assuming that this issue had not been raised below, the Court of Appeals held that there is nothing in the point anyway. It held (Cross-Appellees' App. 36):

> "Even though stowage on deck of cargo shipped under clean bills of lading constitutes a deviation, this does not deprive the carrier of his right to exoneration under the fire provision of the Carriage of Goods by Sea Act, just as it does not deprive the owner of the protection of the fire statute, unless it was a cause of the fire. See *The Ida* 2 Cir. 75 F. 2d 278, 279; *Globe & Rutgers Fire Ins. Co.* v. *United States* 2 Cir. 105 F. 2d 160, 166; *The Venice Maru* 39 F. Supp. 349, 353; *The Margaret Lykes* 57 F. Supp. 466, 470."

In the cases involving fire damage cited by the Court of Appeals, all decided in the Second Circuit, it has been held that after unjustifiable deviations the vessel owners are entitled to the benefit of the exemption of the Fire Statute in connection with cargo destroyed by fire while on vessels, when it appears that the deviations do not cause the fires. We submit that the decisions and the dicta in these cases

are wrong in principle and in conflict with the decisions of this Court and of the Court of Appeals in other circuits where it has been held that statutory exemptions are not open to a carrier after unjustifiable deviations even though not causally related to subsequent losses.

The Willdomino, 272 U. S. 718—involving the statutory exemption from liability for negligence in navigation contained in the Harter Act (Title 46, U. S. C., sec. 192);

The Pelotas, 66 F. (2d) 75 (C. A. 5)—involving the Harter Act and the statutory limitation of liability under Title 46, U. S. C., sec. 183;

Western Lumber Mfg. Co. v. *U. S.* (*The Brush*), 9 F. (2d) 1004 at p. 1006 (N. D. of Calif.)—involving the Harter Act.

The doctrine of the Court of Appeals in the present case no doubt will be considered authoritative in the Fourth Circuit unless reversed. However, that court was in error in assuming that the question presented is the effect of deviation on a statutory exemption for there is no statutory exemption open to the carrier so far as concerns damage sustained by cargo on shore. By its own terms the Carriage of Goods by Sea Act applies only to cargo while it is waterborne (*supra,* p. 6, Note **).

Although the bills of lading provide that the rights of the parties shall be governed by the Carriage of Goods by Sea Act even after the cargo has been discharged from the vessel (Cargo App. 2), this incorporation merely makes the Act a provision of the contract. It has been held by this Court and other courts that after an unjustifiable deviation the carrier

is not entitled to rely upon any of the bill of lading contractual exceptions.

> *St. Johns N. F. Shipping Corp.* v. *Companhia Geral, etc.*, 263 U. S. 119 at p. 124;
> *The Balto*, 282 Fed. 235 at p. 237 (C. A. 2);
> *The Sarnia*, 278 Fed. 459 at p. 463 (C. A. 2);
> *Pacific Coast Co.* v. *Yukon Independent Tr. Co.*, 155 Fed. 29 at p. 37 (C. A. 9).

Of course liability for damage to the cargo now under consideration is not dependent upon proof that the fire resulted from negligence.

As it was Cosmopolitan which improperly stowed this cargo on deck at New York after issuing clean bills of lading therefor, its liability is equal to that of its principal, Mowinckels.

ADDITIONAL QUESTIONS TO BE URGED IF THE PETITION IS GRANTED.

III. Is not an ocean carrier's liability for fire damage on shore to be measured by a different rule from that applicable to fire damage on shipboard?

Many shipments of cargo in relation to which no question of deviation is presented, were destroyed or damaged on the pier at Brest after discharge from the "Ocean Liberty" but while still in the carrier's custody. We have pointed out that the Carriage of Goods by Sea Act only applies while cargo is waterborne.

The Court of Appeals measured the carrier's liability for the destruction of the cargo on shore by the

rule it applied to liability for loss of the cargo on the ship. In this we submit it was in error for there is no issue as to "the actual fault or privity of the carrier" so far as concerns destruction of cargo on shore. Mowinckels cannot, as a common carrier, by reliance upon the Carriage of Goods by Sea Act as a contractual provision, avoid liability for damage resulting from the negligence of any of its agents or servants, however humble.

IV. Is not an agent of an ocean carrier liable for damage resulting from the negligence of its sub-agents and servants?

The Court of Appeals did not deal with the liability of Cosmopolitan as a tort feasor, presumably because it held that the stowage of the "Ocean Liberty" was not negligent. If this Court holds that application of a proper measure of negligence establishes that the fire on the "Ocean Liberty" resulted from improper stowage of the Fgan, we submit that Cosmopolitan is liable for all of petitioners' losses by application of the rule of *respondeat superior*.

We have pointed out that Cosmopolitan's own officers as well as Terminal, which had been Cosmopolitan's agent at Baltimore for 25 years (Cargo App. 3-5), were negligent in the stowage of the "Ocean Liberty".

The District Court held as a matter of law that your petitioners are not entitled to sue Cosmopolitan both as principal and agent in one suit (Ship App. 54). We submit that the law has progressed beyond this formalistic concept.

Ore S. S. Corp. v. *Hassel,* 137 F. (2d) 326 at p. 330 (C. A. 2);
The Jungshoved, 272 Fed. 122 (S. D. N. Y.);
Cobb v. *Knapp,* 71 N. Y. 348 at p. 353;
Melnick Bldg. & Loan Assn. v. *Melnick,* 64 A. (2d) 773, 361 Pa. 328 at p. 334.

As your petitioners' cargo was lost by fire, the main issue of the case from the start was whether the fire resulted from Cosmopolitan's negligence which was, *ipso facto,* that of Mowinckels, as the former was the *alter ego* of the latter. Nearly all the evidence at the trial related to Cosmopolitan's negligence.

In admiralty there is no distinction between contract and tort and there is no such thing as variance. When the evidence is concluded, judgment is entered against a respondent according to the evidence and the law.

Dupont v. *Vance,* 19 Howard 162;
The Gazelle and Cargo, 128 U. S. 474 at p. 487;
Smith, Kirkpatrick & Co. v. *Colombian S. S. Co., Inc.,* 88 F. (2d) 392 at p. 395 (C. A. 5);
O'Connor, Harrison & Co. v. *Klingel,* 16 F. (2d) 460 (C. A. 9);
Perth Amboy No. 1 and 18 Barges, 1934 A. M. C. 152 at p. 153 (S. D. N. Y.).

The District Court held (Ship App. 56) that Cosmopolitan

> "was not guilty of an affirmative act of negligence in the stowage;"

It was guilty of a

> "mere non-feasance and not a misfeasance or mal-feasance in the performance of its duty."

The Court held that Cosmopolitan, as a tort feasor, may not be held liable for mere non-feasance.

Knowing that Fgan was dangerous but without investigation of its characteristics, Cosmopolitan directed its agent at Baltimore to stow Fgan in #3 hold of the "Ocean Liberty" (Cargo App. 219; Ship App. 133); its agent stowed 30,480 paper bags of Fgan as tightly together as possible in the #3 hold. At New York, Cosmopolitan's own employees made fast tarpaulins over the hatchboards above the #3 hold; filled the #3 tween deck with cargo; battened down the #3 weather deck hatch, and covered that hatch with cargo. The action which Cosmopolitan's employees took at New York necessarily increased the danger of spontaneous combustion of the Fgan in the #3 hold.

At New York Cosmopolitan stowed all of your petitioners' cargo on the "Ocean Liberty" already made unseaworthy by the negligent stowage at Baltimore.

An agent who is in possession and control, either directly or through a sub-agent, of the property of others, owes a duty of care with respect to that property, not only to his principal, but also to the owners of the property. Any act or omission which breaches that duty and causes harm to the property is misfeasance, for which the agent is liable in tort to those whose property he has damaged. It is fundamental that any person, whether or not he is acting in a representative capacity, must manage that which he controls so as not to damage the person or property of others by his negligence.

Chiarello Bros. Co. v. *Pederson,* 242 Fed. 482 (C. A. 2);
Quinn v. *Southgate Nelson Corp.,* 121 F. (2d) 190 (C. A. 2);
Fox West Coast Agency Corp. v. *Forsythe,* 131 F. (2d) 629 (C. A. 9);
Landreth v. *Phillips Petroleum Co.,* 74 F. Supp. 801 (W. D. Mo.);
Consolidated Gas Co. v. *Connor,* 114 Md. 140, 78 A. 725;
Mollino v. *Ogden & Clarkson Corp.,* 243 N. Y. 450;
Margulies v. *Denner,* 185 N. Y. Misc. 139, 56 N. Y. S. (2d) 856, aff'd 297 N. Y. 562;
E. H. Emery & Co. v. *American Refrigerator Transit Co.,* 193 Iowa 93, 184 N. W. 750;
Employers Fire Ins. Co. v. *United Parcel Service of Cincinnati, Inc.,* 99 N. E. (2d) 794 (Ct. of App. of Ohio).

Reasons for Allowance of the Writ.

1. The rule which the Court of Appeals adopted by which to measure negligence is shocking in its implication and is contrary to the basic rule by which negligence has heretofore been measured in American courts.

2. It is in conflict with the established rule in other circuits when measuring the negligence of ocean carriers and is in conflict with the rule of the Fourth Circuit itself when measuring the negligence of a rail carrier.

3. The rule that Mowinckels was without "actual fault or privity" within the meaning of the fire excep-

tion of the Carriage of Goods by Sea Act on the facts found to be established, is in conflict with the rule in other circuits.

4. The doctrine should not be countenanced in our courts that by remaining ignorant of the characteristics of cargo it knows to be dangerous, an ocean carrier is entitled to escape liability under the fire exception of the Carriage of Goods by Sea Act for the destruction of cargo caused by spontaneous ignition and subsequent explosion of the known dangerous cargo, directly resulting from the manner of its stowage.

5. Fire is the greatest single cause of loss of cargo at sea. As new types of cargo presenting increased danger of fire are being increasingly offered for ocean carriage, the number of disasters at sea by fire is expanding. The time is ripe for a ruling by this Court that if an ocean carrier wishes to transport dangerous cargo, he must bestir himself and see that it receives the care which its dangerous characteristics demand.

6. The rule that a carrier is exempt from liability under the fire exception of the Carriage of Goods by Sea Act for fire damage sustained by cargo discharged on shore after an unjustifiable deviation, is in conflict with the rule in this Court and in other circuits.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Fourth Circuit, commanding that court to certify and to send to this Court for its review and determination on a date certain to be therein named, a full and complete

transcript of the record and all proceedings of the case entitled on its docket: A/S J. Ludwig Mowinckels Rederi, Appellant, and Cosmopolitan Shipping Co., Inc. and A/S J. Ludwig Mowinckels Rederi, Cross-Appellants, v. Accinanto, Ltd., *et al.*, Appellees and Cross-Appellants; Docket No. 6385; and that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just.

Respectfully submitted,

HENRY N. LONGLEY,
GEORGE W. P. WHIP,
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JAN 7 1953
HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM, 1952

No. 506

ACCINANTO LTD., ET AL.,

Petitioners,

vs.

A/S J. LUDWIG MOWINCKELS REDERI and COSMOPOLITAN SHIPPING COMPANY, INC.,

Respondents.

BRIEF SUBMITTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

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INDEX

PAGE

PROCEEDINGS BELOW 1

FACTS 4

RELEVANT DATES 4

LOADING PRECAUTIONS 5

VENTILATION AND "BAG ON BAG" STOWAGE 6

AIR SPACES AT TOP, BOTTOM AND ON ALL FOUR SIDES OF THE STOW 6

FIRST POINT—The Ocean Liberty was loaded and stowed without negligence on the part of anyone 7

SECOND POINT—It is "established law" that cargo interests are subject to "the onerous burden of proving the cause of a fire and that the negligence of a managing representative of the carrier is related to the fire" (admitted in Petition, p. 14). This "onerous burden" was not sustained 13

THIRD POINT—Erroneous and misleading statements in the petition 16

LAST POINT—The petition for a writ of certiorari should be denied 27

LIST OF AUTHORITIES

American Tobacco Co. v. Katingo Hadjipatera, 194 F. (2d) 449, C. A. 2 13

Annie Faxon, The, 75 Fed. 312, C. C. A. 9 ..... 12, 23

Australian Star, The, 67 Ll. L. L. R. 110 11

Boston Ins. Co. v. Metropolitan Redwood Co., 197 Fed. 703, C. C. A. 9 ..... 11, 23

PAGE

Cabo Hatteras, The, 5 F. Supp. 725 11

Canadian Nor. Ry. v. Senske, 201 Fed. 637, C. C. A. 8 12

Chester Valley, The, 110 Fed. (2d) 592, C. C. A. 5 15

Colima, The, 82 Fed. 665 17

Columbia, The, 25 F. (2d) 516, aff'd 25 F. (2d) 518, C. C. A. 2 23

Cornec v. Balt. & O. R. R., 48 F. (2d) 497, C. C. A. 4 25

F. O. Bradley & Sons v. Fed. S. N. Co., 137 Law Times R. 266 11

Great Atlantic & Pac. Tea Co. v. Lloyd Brasileiro, 159 F. (2d) 661, C. C. A. 2 24

Hoskyn v. Silver Line, 143 F. (2d) 462, C. C. A. 2 ..... 13, 15

New York Central R. R. v. Ambrose, 280 U. S. 486 15

Olsen v. U. S. Shipping Co., 213 Fed. 18, C. C. A. 2 17

Overton v. Wenatchee Orchard Co., 183 Pac. (2d) 473 15

Panama Mail S.S. Co. v. Davis, 79 F. (2d) 430, C. C. A. 3 12

Peltola v. Whiting, 132 F. (2d) 857, C. C. A. 2 15

Petition of Canadian Pac. Ry. Co., 278 Fed. 180, 189, C. C. A. 9 23

Picqua, The, 97 Fed. 649 17

Richelieu, The—see Cornec v. Balt. & O. R. R. Co.

Ryan v. Feeney Bldg. Co., 239 N. Y. 43 12

Shankweiler v. B. & O. R. R., 148 Fed. 195, C. C. A. 6 13

South Coast, The, 71 F. (2d) 891, C. C. A. 9 12

Spang Chalfant v. Dimon S.S. Co., 57 F. (2d) 965 21

PAGE

Strathdon, The, 89 Fed. 374, aff'd 101 Fed. 600, C. C. A. 2 13

Tempus Shipping Co. v. Dreyfus, L. R. 1931, 1 K. B. 195, aff'd 1931 A. C. 726 22

Texas City Disaster Litigation, 197 F. (2d) 771 19

Titania, The, 19 Fed. 101 11

U. S. v. Chemical Foundation, Inc., 272 U. S. 1 24

U. S. v. Rock Royal Cooperative, 307 U. S. 533 24

Waddell v. A. Guthrie, 45 F. (2d) 977, C. C. A. 10 13

STATUTES

Carriage of Goods by Sea Act, 46 U. S. C. 1301(e) 26

Fire Statute, 46 U. S. C. 182 26

46 U. S. C. 170(7) (requiring that stowage be in accordance with Regulations of Coast Guard) 12